Supreme Court, U.S.
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No. 10-668

In The
Supreme Court of the United States

MARY ROBYN PRIESTER,

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the National Traffic and Motor Vehicle Safety Act of 1966, 49 U.S.C. §§ 30101 *et seq.*, or Federal Motor Vehicle Safety Standard 205, 49 C.F.R. 571.205, which incorporates by reference an industry standard that gives car manufacturers the option of installing either tempered glass or some form of "advanced glazing" in the side windows of passenger vehicles, preempt a state-law tort claim that a passenger truck was unreasonably dangerous because it utilized tempered glass in its side window.

PARTIES TO THE PROCEEDINGS

Petitioners are Mary Robyn Priester, Individually and as Natural Mother/Next of Kin, and Personal Representative of the Estate of James Lloyd Priester.

Respondent is Ford Motor Company.

Preston Williams Cromer remains a nominal party in the case.

Stage Light Management, d/b/a Showgirls(z); and Lloyd Brown, individually and doing business as Showgirls(z), and Nikki D's Inc. are no longer parties to this action due to either dismissal or settlement.

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OPINIONS BELOW

The opinion of the South Carolina Supreme Court (Pet. App. 1-13) is reported at 697 S.E.2d 567. The order of the trial court granting respondent Ford Motor Company's motion for summary judgment (Pet. App. 14-34) is not reported.[1]

JURISDICTION

The lower court entered judgment on August 2, 2010, and a timely petition for rehearing was denied on September 2, 2010. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The National Traffic and Motor Vehicle Safety Act of 1966, 49 U.S.C. §§ 30101 *et seq.*, provides in relevant part:

49 U.S.C. § 30103. Relationship to other laws.

> **(b) Preemption.** (1) when a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a

[1] Citations to "Pet. App." are to the appendix to this Petition. Citations to "R." are to the record in the court below.

> State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.
>
> * * *
>
> (e) **Common Law Liability.** Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.

Federal Motor Vehicle Safety Standard 205, 49 C.F.R. § 571.205 (1997), provides as follows:

> S.1. Scope. This standard specifies requirements for glazing materials for use in motor vehicles and motor vehicle equipment.
>
> S2. Purpose. The purpose of this standard is to reduce injuries resulting from impact to glazing surfaces, to ensure a necessary degree of transparency in motor vehicle windows for driver visibility, and to minimize the possibility of occupants being thrown through the vehicle windows in collisions. . . .

As the lower court observed, Standard 205 does not itself specify which types of glazing materials may be used in motor vehicles. Pet. App. 5. Rather, Standard 205 simply incorporates by reference a

safety code developed by the American National Standards Institute. *Id.* Thus, the Standard provides:

> S5.1.1.6. Multipurpose passenger vehicles. Except as otherwise specified provided by this standard, glazing for use in multi-purpose passenger vehicles shall conform to the requirements for glazing for use in trucks as specified in [American National Standards] Z26.

Pet. App. 5-6. The relevant version of ANSI Z26 permits the use of either tempered glass or some form of advanced glazing (*e.g.*, laminated glass), on the side windows of passenger vehicles, so long as the glass meets certain testing requirements. Pet. App. 6.

INTRODUCTION

This case raises an issue of recurring importance that is closely related to a case that is currently pending before this Court: *Williamson v. Mazda Motor of America, Inc.*, No. 08-1314 (U.S. argued Nov. 3, 2010). In this case, the lower court ruled that Standard 205, which gives car manufacturers the option of utilizing either tempered or laminated glass in the side windows of cars, preempts state-law tort claims. A similar issue is presented in *Williamson*: whether Federal Motor Vehicle Safety Standard 208, which gives car makers the option of installing either lap belts or lap-belt/shoulder

harnesses in the rear-center seats of cars (and the rear-aisle seats of minivans) preempts state-law tort claims. Because the Court's resolution of *Williamson* is likely to provide guidance to the courts below on the preemptive effect of regulations, like Standards 205 and 208, that give manufacturers different technological options for addressing a given safety issue, this petition should be held pending the Court's disposition of *Williamson*, and then the case vacated and remanded for further proceedings to the Supreme Court of South Carolina.

Alternatively, because this petition presents a question that is significant in its own right, this Court should grant the petition irrespective of its handling of *Williamson*. *See* Brief for the United States as *Amicus Curiae* in support of review, *Williamson v. Mazda Motor of America, Inc.*, No. 08-1314 (U.S. Apr. 2010), at 20-22 (arguing that the split of authority regarding the preemptive effect of Standard 205 is an important issue that should be resolved by this Court).

STATEMENT OF THE CASE

Statutory and Regulatory Background:

1. The Safety Act.

Congress passed the National Traffic and Motor Vehicle Safety Act of 1966 (the "Safety Act"), 49 U.S.C. §§ 30101 *et seq.*, to reduce motor vehicle

injuries and deaths. *See* S. Rep. No. 89-1301, 89th Cong., 2d Sess. 1-2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2709-10; H.R. Rep. No. 89-1776, 89th Cong., 2d Sess. 10-11 (1966). To this end, Congress empowered the National Highway Traffic Safety Administration ("NHTSA") to prescribe minimum motor vehicle safety standards. 49 U.S.C. §§ 30101, 30104. The Safety Act provides that "[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. § 30103(e). In *Geier v. American Honda Motor Co.*, 529 U.S. 861, 870 (2000), this Court interpreted the savings clause as evidencing Congress's intent to "preserve" common-law tort claims "that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor." The Court went on to explain that only a common-law claim that "actually conflict[s]" with federal law will be preempted. *Id.* at 874.

2. Standard 205.

Standard 205, issued pursuant to the Safety Act, specifies minimum requirements for glazing materials in motor vehicles. 49 C.F.R. § 571.205 § 1. The stated purposes of Standard 205 include minimizing occupant ejections:

> S2. Purpose. The purpose of this standard is to reduce injuries resulting from impact to glazing surfaces, to ensure a necessary degree of transparency in motor vehicle

> windows for driver visibility, and to minimize the possibility of occupants being thrown through the vehicle windows in collisions.

49 C.F.R. § 571.205, § 2.

Notably, Standard 205 does not itself contain standards for the design, installation, or performance of motor vehicle windows. Instead, the regulation simply adopts and incorporates by reference the standards for automotive glass created by the American National Standards Institute ("ANSI"). 49 C.F.R. § 571.205, § 5.1; ANSI Z26.1-1980.

At the time NHTSA first promulgated Standard 205 (in 1966, when the first auto safety standards were promulgated), the agency did not specify any particular policy reason for adopting the ANSI materials standard. *See* 31 Fed. Reg. 15,219 (Dec. 3, 1966). The sole statement of purpose accompanying the rulemaking provided as follows:

> S1. Purpose and Scope. This standard specifies requirements for glazing materials to reduce superficial and deep lacerations to the face, scalp, and neck, and to prevent occupants from being thrown through the vehicle windows in collisions.
>
> S3.1 Materials. Glazing materials used in windshields, windows, and interior partitions shall conform to United States of America Standards Institute "American Standard Safety Code for Safety Glazing Materials for Glazing Motor Vehicles Operating on Land

> Highways." USA Standard Z26.1-1966, July 15, 1966.

Id.

Similarly, in 1984, when NHTSA amended Standard 205 to adopt the 1980 version of ANSI Z26.1 (which is the version relevant here), the agency's adoption amendment merely stated:

> This notice amends Standard No. 205, Glazing materials, to adopt by reference the 1980 version of American National Standard Z26, the safety code for glazing materials promulgated by the American National Standards Institute. Adoption of the most recent version of Z26 will permit the use of the latest technological developments in glazing.

49 Fed. Reg. 6732 (Feb. 23, 1984) (incorporating ANSI Z26.1-1977, as supplemented by Z26.1(a), July 3, 1980)).

Neither the original nor amended versions of ANSI Z26.1 contain any tests, standards, requirements, or guidelines for the design or performance of the actual window systems used in cars. Instead, ANSI Z26.1 has always simply listed various types of window materials (including tempered glass, laminated glass, and glass-plastic, R. 73) and specified various tests for determining whether a safety glazing material qualifies for acceptance under the code. R. 84-103. The ANSI tests, which relate to light, luminosity, humidity, boil, impact, fracture, and abrasion resistance, are performed only on 12" x 12"

or smaller flat specimens in the laboratory. *Id.* There are no ANSI tests for the design or performance of the actual full-size glass in motor vehicle windows, for the performance of the window systems in crashes, or for the prevention or minimization of occupant ejections.

The Foreward to the 1980 standard emphasized that it is merely "intended to provide minimum requirements" for window glazing, and that "[t]his standard does not itself state that safety glazings shall be used or to what extent they shall be used in glazing motor vehicles. Such requirements rest with either the legislative or administrative authority." R. 72-73.

In 1988, NHTSA announced its proposal to amend Standard 205 to eliminate the option of using tempered glass in vehicle side windows and, instead, to require some form of advanced glazing, such as laminated glass, in all vehicle windows. *See* Advanced Notice of Proposed Rulemaking, Side Impact Protection – Passenger Cars, 53 Fed. Reg. 31,712 (Aug. 19, 1988). The purpose of this proposal was to minimize passenger ejections in the event of rollovers. *Id.*[2]

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[2] Laminated glass reduces passenger ejections because it is likely to keep the passenger inside a vehicle due to the "adhering" quality of the glass. Pet. App. 6.

NHTSA proceeded to study the potential costs and benefits of its proposal. In 2001, NHTSA announced its conclusions that the use of advanced glazing in side windows "could save 537 to 1,305 lives annually," and that, through use of advanced glazing, "an estimated 235 to 575 serious . . . injuries could be reduced annually." R. 231 (NHTSA, Ejection Mitigation Using Advanced Glazing: Final Report, 2001, at vi). NHTSA further found that "[a]dvanced glazing systems have the potential to yield significant safety benefits by reducing partial and complete ejections through side windows, particularly in rollover crashes," R. 234 (*id.* at ix), and that, "[i]n most side impact and rollover crashes, the tempered window glazing shatters. . . ." R. 267 (*id.* at 31).

Despite these conclusions, NHTSA ultimately decided to withdraw its proposal to require advanced glazing in all side windows. 67 Fed. Reg. 41,365 (June 18, 2002). The agency emphasized a concern that requiring advanced glazing in all cars "would require modifications to the design of all vehicles currently being produced to make their windows smaller, and the cost of such a design modification would be significant." *Id.* at 41,367. Further, NHTSA noted that the well-established safety benefits of advanced glazing in side windows were not without drawbacks, including a slightly increased risk of minor neck injuries. *Id.* at 41,366-67. In light of these concerns, NHTSA stated that it would "not continue to examine a potential requirement for advanced side glazing." *Id.*

The agency has continued, however, to permit advanced glazing as one of the regulatory options for side windows, and has continued to study advanced glazing alternatives as a means of mitigating passenger ejection through side windows. *See O'Hara v. General Motors Corp.*, 508 F.3d 753, 756 (5th Cir. 2007) (discussing history of Standard 205 and NHTSA's on-going study of the safety benefits of advanced glazing).[3]

3. This Litigation.

James Lloyd Priester was fatally crushed when he was ejected from the back of a 1997 Ford F-150 pickup truck manufactured by respondent Ford Motor Company, Inc. James' mother filed a South Carolina state-court lawsuit against Ford asserting strict products liability and negligence for the defective design of the vehicle's side windows. The complaint specifically alleged that Ford's use of tempered glass

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[3] *See also* NHTSA, Initiatives to Address the Mitigation of Vehicle Rollovers, June 2003 (discussing the agency's hope of "significantly reduc[ing] the potential for partial and complete ejection fatalities and injuries" through "window curtains and/or advanced glazing requirements"); NHTSA, Vehicle Safety Rulemaking Priorities and Supporting Research: 2003-2006 (discussing "promising technological innovations to prevent occupant ejections," including "improved glazing" of side windows); NHTSA, Vehicle Safety Rulemaking and Supporting Research Priorities: Calendar Years 2005-2009 (same).

in the truck's side windows was unreasonably dangerous and that some form of advanced glazing would have decreased the likelihood of passenger ejection.

Ford moved for summary judgment on the ground that Standard 205 preempted Ms. Priester's claims because a jury verdict in her favor would undermine the regulatory option, thereby conflicting with federal purposes. In so arguing, Ford relied heavily on *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), in which this Court held that a federal safety standard that gave car makers the option of installing either airbags or some other form of passive restraint in the front-driver seats of cars preempted state-law claims that a car was defective because it lacked an airbag.

After argument on Ford's summary judgment motion but before a decision was rendered, the United States Court of Appeals for the Fifth Circuit became the first appellate court to consider whether Standard 205 preempts tort claims seeking to hold a car manufacturer liable for failing to install laminated glass in side windows. *O'Hara v. General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007). After an exhaustive inquiry into the regulatory history of Standard 205, the court of appeals ruled that Standard 205 does not preempt such claims, holding that Standard 205's allowance of a range of window-glazing options "does not establish a federal policy which would be frustrated by a state common law rule requiring advanced glazing in side windows." *Id.* at 758.

After ordering supplemental briefing on *O'Hara*, the trial court rejected the Fifth Circuit's ruling, finding that "the *O'Hara* panel relied on the wrong data, did not consider important policy pronouncements of [NHTSA], and, as a result, reached the wrong conclusion regarding preemption." Pet. App. 23.

The Supreme Court of South Carolina affirmed. Pet. App. 1. The court observed that "[c]ourts across the country faced with this issue have struggled with the preemptive effect, if any, of [Standard] 205 and have reached opposite conclusions." Pet. App. 2. "Pending resolution from the United States Supreme Court," however, the court sided with those courts finding federal preemption of side-window claims, holding that "[t]o allow this suit to go forward would sanction a jury finding the Ford F-150 pickup truck to be defectively designed solely because it selected the federally authorized choice of tempered glass." Pet App. 2, 12. According to the court, because "such a result would stand as an obstacle to achieving the purposes and objectives of [Standard] 205, the state tort action presents a conflict between federal law and state law." Pet. App. 12.

Petitioner moved for rehearing on various grounds, including that rehearing was warranted because this Court had recently granted review in *Williamson v. Mazda Motor of America, Inc.*, No. 08-1314. The lower court denied the petition without comment on September 2, 2010. Pet. App. 40.

REASONS FOR GRANTING REVIEW

I. THIS CASE RAISES MANY OF THE SAME IMPORTANT ISSUES AS *WILLIAMSON V. MAZDA* REGARDING THE PREEMPTIVE EFFECT OF REGULATORY OPTIONS.

The most obvious reason review is warranted is because this case overlaps substantially with *Williamson v. Mazda Motor of America, Inc.*, No. 08-1314, which is pending before this Court. Although *Williamson* involves a different federal regulatory option – Standard 208, which at the relevant time gave manufacturers the option of installing either lap belts or lap-belt/shoulder harnesses in the rear-center seats of cars and the rear-aisle seats of minivans – both cases present the same overarching federal question: whether the lower courts "gave too broad a reading to *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000)," by according preemptive effect to a federal safety standard that "manifests no affirmative intent to foster multiple options . . . " *See* Brief for the United States as *Amicus Curiae* in support of review, *Williamson v. Mazda Motor of America, Inc.*, No. 08-1314 (U.S. Apr. 2010) ("U.S. *Cert.* Brief") at 20-22.

There can be no serious dispute that this case is as worthy of review as *Williamson*. There, the United States argued that review was warranted in order to resolve the confusion generated by *Geier*, which held that the regulatory option embodied in Standard 208 preempted state-law claims that a car was defective because it lacked an airbag. Notably, the governments' brief emphasized the split of authority with

regard to the regulation at issue in this case – Standard 205 – as a reason why review should be granted in *Williamson*. *See id.* at 20-21 (explaining that "lower courts have reached conflicting conclusions on how to apply *Geier* to [Standard] 205" and have "noted the need for further guidance from this Court").

The United States emphasized that *Geier* has been broadly misread to mean that *any* options standard has preemptive effect, even where the standard "manifests no affirmative intent to foster multiple options. . . ." U.S. *Cert.* Br. at 9. This "methodological error," the United States has explained, "is important: it mistakenly deprives the Safety Act's savings clause of its proper effect; it transforms [a] . . . [safety standard] from a minimum standard into a definitive standard of care; and it does so contrary to the consistent position of the agency that promulgated the standards." *Id.* at 8. These concerns, in the Government's view, rendered the question presented in *Williamson* "sufficiently important and recurring to warrant this Court's review." *Id.*

All of these concerns apply with equal force here. Despite their differences, the safety standards involved in *Williamson* and in this case are identical in two crucial respects: (1) as in *Geier*, both give manufacturers the option of using more than one technology to address a particular safety issue; but (2) unlike *Geier*, neither this case nor *Williamson* involves a standard that "affirmatively encouraged the adoption of diverse forms of [technology]" or was

based on an "affirmative intent to foster multiple options." U.S. *Cert.* Br. at 9. And, as in *Williamson*, the lower court's misapprehension of the regulatory purposes underlying Standard 205 effectively "transform[ed]" Standard 205 "from a minimum level of care into a definitive level of care," thereby "effectively depriving the Safety Act's savings of its proper effect." *Id.* at 8.

In light of this history, review is clearly warranted in this case. Because the decision to grant review in *Williamson* was based in part on the conflict in cases arising under Standard 205, it would be wrong to deny review in precisely such a case while *Williamson* is still pending, especially given the possibility that *Williamson* may not yield a majority decision.[4] Instead, the Court should grant review here and hold this case pending the outcome in *Williamson,* thereby preserving the possibility of either a remand to the lower court or, to the extent appropriate, consideration of this case on the merits in the wake of *Williamson*.[5]

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[4] Associate Justice Kagan has recused herself from *Williamson* because she was Solicitor General when the United States filed its *cert.* brief in that case.

[5] This is how this Court treated the petition for *certiorari* in *Colacicco v. Apotex, Inc.*, No. 08-437 (Oct. 2, 2008), which was filed when *Wyeth v. Levine*, 129 S.Ct. 1187 (2009), was still pending before this Court. Although *Colacicco* presented a different, albeit related, issue than *Wyeth* – the former involved federal preemption of failure-to-warn claims involving *generic* prescription drugs, whereas the latter involved federal preemption of such claims relating to *brand-name* drugs – this Court

(Continued on following page)

II. THERE IS A SPLIT OF AUTHORITY ON THE QUESTION PRESENTED, WHICH IS AN IMPORTANT ISSUE OF FEDERAL LAW IN ITS OWN RIGHT.

Williamson aside, review is warranted because the lower courts are deeply split and in need of guidance regarding the preemptive effect of Standard 205. U.S. *Cert.* Br. at 20-22. Indeed, as the lower court acknowledged, "[c]ourts across the country faced with this issue have struggled with the preemptive effect, if any, of [Standard] 205 and have reached opposite conclusions." Pet. App. 1.

Thus, for example, in *Morgan v. Ford Motor Company*, 680 S.E.2d 77, 94-95 (W. Va. 2009), the Supreme Court of West Virginia held that Standard 205 preempts the same claims at issue in this case, yet described itself as being "stuck between a rock and a jurisprudential hard place." The court went on to observe that, in its view, "*Geier* is flawed because it requires courts to . . . divine an agency's interpretation from extraneous materials to determine the preemptive effect of a regulation . . . [But] *Geier* is, until altered or explicated by [this] Court, the guiding law of the land." *Id.* The Tennessee Court of Appeals reached the same conclusion, similarly bemoaning what it understood to be the dictates of *Geier*. *See*

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held the *Colacicco* petition pending the outcome of *Wyeth*, and then later vacated and remanded the petition for further consideration in light of its ruling in *Wyeth*. *Colacicco v. Apotex, Inc.*, 129 S.Ct. 1578 (2009).

Lake v. Memphis Landsmen, LLC, 2010 WL 891867, at *7 (Tenn. Ct. App. Mar. 15, 2010) (noting that, "[a]s was the *Morgan* court, this Court is 'stuck between a rock and a jurisprudential hard place.'") (citing *Morgan*).

Prior to these rulings, however, the United States Court of Appeals for the Fifth Circuit had issued its ruling in *O'Hara v. General Motors Co.*, 508 F.3d 753 (5th Cir. 2007), which rejected a claim that Standard 205 preempts claims concerning a car maker's failure to install laminated glass in the side windows of a passenger vehicle. Based on an exhaustive analysis of the text and history of Standard 205, and the meaning and scope of *Geier* (which it found distinguishable), the Court of Appeals concluded that allowing a range of window-glazing options "does not establish a federal policy which would be frustrated by a state common law rule requiring advanced glazing in side windows." *Id.* at 758.

Despite the Fifth Circuit's thorough treatment of the issue, three state courts of last resort (*Morgan, Landsmen*, and the court below) disregarded *O'Hara* in favor of its own interpretation of *Geier* as applied to Standard 205.[6] *O'Hara* was well reasoned and thorough, both with respect to its extensive recitation

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[6] There is also a split of authority on the question presented among numerous lower federal courts and state courts. *See generally Morgan*, 680 S.E.2d at 89 nn. 12 and 13 (collecting cases).

of the regulatory history of Standard 205 and its discussion of governing authority. Further percolation would be of little benefit, because the issue has been fully aired and the battle lines clearly drawn. The United States was correct when it identified this split as worthy of immediate review.

On a practical level, this case involves an even more significant real-world issue than *Williamson*. That case involves a type of passenger restraint – the two-point lap belt – that is no longer permitted by Standard 208. Yet in *Williamson*, the United States argued that the "issue remains significant" because "NHTSA estimates that in 2008, approximately 1,040,438 vehicles in the United States were equipped with some Type 1 seatbelts. . . ." U.S. *Cert.* Br. at 19. In this case, in contrast, the technology at issue – tempered glass in the side windows of passenger vehicles – is still permitted by NHTSA, and new cars with this technology are rolling off the assembly line every day. Thus the issue in this case dwarfs *Williamson* in terms of its real-world impact. Both car makers and the public have an undeniably powerful interest in knowing the extent to which car makers may be held liable for failing to install laminated glass in the side windows of cars.

III. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW IS CONTRARY TO PRIOR RULINGS OF THIS COURT.

Finally, review is warranted because the lower court misapplied the two most relevant decisions of this Court: *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000), and *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). Every court to find that Standard 205 preempts state-law claims, including the South Carolina Supreme Court in this case, has relied on this Court's ruling in *Geier* as the governing authority. (The same is true of the split of authority with regard to the claims at issue in *Williamson*.) These holdings all ignore that none of the policy considerations that *Geier* found dispositive with respect to NHTSA's passive-restraint standard was present in NHTSA's Standard 205 rulemakings.

In contrast to the hotly-debated technology at issue in *Geier* (the airbag), this case involves an uncontroversial device – laminated glass – that has never been the subject of any sort of public outcry, and that has in fact been permitted in side windows and *mandated* for front windshields by NHTSA for nearly four decades. *See* 32 Fed. Reg. 2408, 2414 (Feb. 3, 1967). Thus, unlike in *Geier*, there was no fear of a "public backlash" against particular technology that prompted NHTSA to give manufacturers an array of technological options. 529 U.S. at 891. Nor was there any "phase in" of any particular technology (*id.* at 879); any plan on NHTSA's part to "bring about a mix of different devices introduced gradually over

time" (*id.* at 875); any statement by NHTSA that it needed to "deliberately provide the manufacturer with a range of choices" (*id.* at 874); or any "policy judgment that safety would best be promoted if manufacturers installed alternative protection systems in their fleets rather than one particular system in every car." *Id.* at 881.

To the contrary, NHTSA's adoption and incorporation by reference of the ANSI standards was unadorned by any statements *at all* regarding the preservation of regulatory options. *See O'Hara*, 508 F.3d at 761 ("There is no language in the Glazing Materials Final Rule commentary indicating that NHTSA intended to 'preserve the option' of using tempered glass in side windows, or that preserving this option would serve the safety goals of [Standard 205]."). The only fact that can be gleaned from NHTSA's decision to adopt the ANSI standards is that NHTSA wanted cars to have, at a minimum, side windows made of an industry-approved material. *See id.* at 760 (holding that Standard 205 "is a materials standard that sets a safety 'floor' to ensure that the glazing materials used by manufacturers meet certain basic requirements."). It is hard to imagine a scenario less like *Geier*, or one less worthy of triggering a finding of federal preemption.

In light of this background, it is not surprising that the Fifth Circuit, in *O'Hara*, held *Geier* to be inapplicable to Standard 205 cases, and found, instead, that cases like this one are governed by this Court's unanimous decision in *Sprietsma*. *Id.* at 762.

In *Sprietsma*, this Court held that state-law claims seeking to hold a boat-engine manufacturer liable for failing to install a propeller guard on a passenger boat engine were not preempted by the U.S. Coast Guard's decision not to require propeller guards on all small motor boats. 537 U.S. at 65. In so holding, this Court noted that the Coast Guard's decision to not impose a universal propeller-guard requirement was based on cost/benefit considerations (in particular, concerns about the costs of requiring a propeller-guard retrofit on "millions" of existing boats), as well as the "lack of any 'universally acceptable model' propeller guard for 'all modes of boat operation.'" *Id.* at 67. The Court further noted that the Coast Guard continued to study propeller-guard technology and left open the possibility of imposing a universal requirement at some point in the future. *Id.* at 61-62.

The Coast Guard's decision not to require propeller guards on boat engines is strikingly similar to NHTSA's 2002 decision not to require advanced glazing in the side windows of cars. Just as in *Sprietsma*, NHTSA studied the possibility of requiring advanced glazing in side windows but concluded, based on a cost/benefit analysis, that it lacked sufficient data to justify the imposition of a universal advanced-glazing requirement. Just as in *Sprietsma*, NHTSA based this decision in part on concerns about the costs of modifying the design of all vehicles to accommodate advanced glazing technology. 67 Fed. Reg. at 41,367. Just as in *Sprietsma*, NHTSA has continued to study the possible benefits of advanced glazing in

order to determine how the technology can best be used to achieve the agency's overall safety goals. *See O'Hara*, 508 F.3d at 762. And just as in *Sprietsma*, NHTSA has repeatedly emphasized the potential safety benefits of advanced glazing, never banned it, and continues to permit its use.

For all these reasons, the Fifth Circuit was correct when it "[found] the parallels between NHTSA's Withdrawal of Rulemaking and the Coast Guard's statements in *Sprietsma* to be compelling." *O'Hara*, 508 F.3d at 762. In this case, as in *Sprietsma*, there is no basis for concluding that the agency's decision not to require a particular safety feature exerts preemptive force. The South Carolina Supreme Court's conclusion to the contrary is but one example of the way in which myriad lower courts have misread this Court's rulings in both *Geier* and *Sprietsma*. Review is warranted to instruct the lower courts as to the proper legal framework and to clarify the meaning and scope of this Court's prior preemption holdings.

CONCLUSION

For the foregoing reasons, this petition for a writ of *certiorari* should be held pending the Court's decision in *Williamson*, after which the Court should grant the petition, vacate the judgment below, and remand for reconsideration in light of *Williamson*. In

the alternative, the Court should grant the petition and schedule the case for briefing and hearing on the merits.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Mary Robyn Priester, Individually and as Natural Mother/Next of Kin, and Personal Representative of the Estate of James Lloyd Priester, Appellant,

v.

Preston Williams Cromer, Stage Light Management, d/b/a Showgirls(z); and Lloyd Brown, individually and doing business as Showgirls(z), and Nikki D's Inc., and Ford Motor Co., Defendants,

Of whom Ford Motor Co. is, Respondent.

Appeal from Orangeburg County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 26846
Heard March 16, 2010 – Filed August 2, 2010

AFFIRMED

Darrell T. Johnson, Jr., of Hardeeville, and James B. Richardson, Jr, of Columbia, for Appellant

Curtis L. Ott and Carmelo B. Sammataro, both of Turner, Padget, Graham & Laney, of Columbia, and Robert W. Powell, of Dickinson Wright, of Detroit, Michigan for Respondent.

William C. Wood, Jr, of Nelson, Mullins, Riley & Scarborough, of Columbia, for Amicus Curiae Product Liability Advisory Council.

JUSTICE KITTREDGE: This case concerns whether Federal Motor Vehicle Safety Standard 205 (49 C.F.R. § 571.205 (1971)) preempts a state law products liability claim premised solely on a manufacturer's choice of tempered glass for a vehicle's side windows. Federal Motor Vehicle Safety Standard 205 (Regulation 205) mandates that "[g]lazing materials[1] for use in motor vehicles . . . shall conform" to the American National Standard Institute "safety code for safety glazing materials." Courts across the country faced with this issue have struggled with the preemptive effect, if any, of Regulation 205 and have reached opposite conclusions. Pending resolution from the United States Supreme Court, we join those jurisdictions finding the federal regulation preempts state law, and therefore, we affirm the trial court's

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[1] The term "glazing materials" here refers to the glass used in a motor vehicle.

grant of summary judgment in favor of Ford Motor Company.

I.

In the early morning hours of August 17, 2002, Preston Cromer was driving a 1997 Ford F-150 pickup truck at excessive speed near St. George, South Carolina, when he drove off the road and rolled the truck several times. Appellant's son, James Lloyd Priester, who was in the rear seat of the truck and not wearing his seatbelt, was ejected and died at the scene. Cromer and Priester, both of whom were under twenty-one years old, were apparently intoxicated after they had allegedly been served alcohol at Showgirls(z), a strip club located in Santee, South Carolina.

Appellant filed a products liability claim against Ford.[2] Specifically, Appellant alleged Ford "breached said warranty by using inappropriate glazing materials which would retain occupants inside the vehicle, and which would not shatter on impact." Ford moved for summary judgment, arguing Regulation 205 preempted the claim. Ford asserted Regulation 205 provided car manufacturers with options of types of glass they were permitted to use, and since Ford used one of the glass options, the state law products

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[2] Additionally, Appellant filed a negligence suit against Cromer and a dram shop liability suit against Showgirls(z) and Nikki D's alleging the sale of alcohol to minors.

liability suit was preempted by the regulation. Although the court recognized the Fifth Circuit Court of Appeals issued an opinion holding Regulation 205 did not preempt state law, the trial court agreed with Ford's position and granted its motion for summary judgment.

II.

The preemption doctrine is rooted in the Supremacy Clause of the United States Constitution and provides that any state law that conflicts with federal law is "without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Two "cornerstones" of United States Supreme Court preemption jurisprudence provide: 1) the purpose of Congress is the ultimate touchstone in every preemption case; and 2) courts should begin with a presumption against preemption. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1195 (2009).

A federal law may either expressly preempt a state law through specific language clearly stating its intent or it may impliedly preempt a state law through field preemption or conflict preemption. *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985). Field preemption occurs when the scheme of federal regulation is so pervasive that it is reasonable to infer that Congress left no room for the states to regulate. *Id.* On the other hand, conflict preemption occurs where compliance with both federal and state regulations is

physically impossible or where the state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). This case implicates conflict preemption.

a. Regulation 205

Under the authority of the National Traffic and Motor Vehicle Safety Act of 1966, the National Highway Traffic Safety Administration (NHTSA) promulgated Regulation 205. This regulation provides:

> S1. Scope. This standard specifies requirements for glazing materials for use in motor vehicles and motor vehicle equipment.
>
> S2. Purpose. The purpose of this standard is to reduce injuries resulting from impact to glazing surfaces, to ensure a necessary degree of transparency in motor vehicle windows for driver visibility, and to minimize the possibility of occupants being thrown through the vehicle windows in collisions. . . .

Regulation 205 does not itself specify which types of glazing materials may be used in motor vehicles. Rather, it requires adherence to the following safety code developed by the American National Standards Institute:

> S5.1.1.6 Multipurpose passenger vehicles. Except as otherwise specifically provided by this standard, glazing for use in multipurpose passenger vehicles shall conform to

> the requirements for glazing for use in trucks as specified in ANS Z26.

ANS Z26 provides that laminated glass or tempered glass may be used on the side windows of motor vehicles, so long as the glass meets certain testing requirements.[3] Laminated glass differs from tempered glass in that laminated glass consists of two or more sheets of glass held together by an intervening layer or layers of plastic material. Laminated glass will crack and break under sufficient impact, but the pieces of glass tend to adhere to the plastic. Conversely, tempered glass consists of a single sheet of specially treated glass, and when broken, the entire piece immediately shatters into innumerable small, granular pieces. Thus, it can be stated generally that tempered glass is safer for vehicle occupants wearing seatbelts, where the risk of ejection is reduced, because it provides less risk of additional injuries. Laminated glass is safer for unbelted passengers, where the risk of ejection is increased, because it is likely to keep a passenger inside the vehicle due to the "adhering" quality of the glass.

b. NHTSA Study

During the 1990s, NHTSA began a research program to study rollover accidents in an effort to maximize the protection of occupants. NHTSA focused on

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[3] Laminated glass is the only type of glazing material manufacturers are allowed to use on windshields.

Regulation 205 and considered whether to modify the regulation to mandate manufacturers to use advanced glazing[4] on side windows in order to reduce the likelihood of ejections. *See* NHTSA, Rollover Prevention, Advance Notice of Proposed Rulemaking, 57 Fed. Reg. 242 (Jan. 3, 1992). After studying the costs and benefits associated with the use of advanced glazing in side windows, NHTSA issued a notice of withdrawal, indicating Regulation 205 would not be modified. *See* Notice of Withdrawal, 67 Fed. Reg. 41, 365 (June 18, 2002). In the final report explaining the decision not to require advanced glazing, NHTSA reported that it found advanced glazing increased the risk of neck and back injuries in rollover accidents. NHTSA was "extremely reluctant to pursue a requirement that may increase injury risk for belted occupants to provide safety benefits primarily for unbelted occupants, by preventing their ejection from the vehicle," and thus, "the agency will not continue to examine potential regulatory requirement for advanced side glazing."

c. United States Supreme Court

In *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861 (2000), the United States Supreme Court granted a writ of certiorari from the District of Columbia

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[4] Advanced glazing refers to laminated glass and glass-plastic glazing material, which can withstand more impact before shattering compared to tempered glass.

Circuit Court of Appeals in order to resolve a dispute among courts across the country regarding whether Regulation 208[5] preempted state law products liability claims. Regulation 208 specifies performance requirements for passive restraint systems for the protection of occupants in vehicle crashes in order to reduce the number of deaths and severity of injuries. The regulation set forth a detailed timeline in which manufacturers were required to gradually introduce airbag technology prior to 1997. Manufacturers were permitted to choose which restraint, among a range of different passive restraint devices, e.g.: airbags; automatic seatbelts; ignition interlock devices, to incorporate into their vehicles.

The plaintiff in *Geier* filed a state law products liability claim against Honda. Although the vehicle was equipped with a proper seatbelt system and was in compliance with Regulation 208, the plaintiff alleged the vehicle was defective because Honda failed to equip the vehicle with airbags. The United States Supreme Court determined that in promulgating Regulation 208, the Department of Transportation deliberately provided the manufacturer with a range of choices among different passive restraint devices to be gradually introduced. The Court found this phase-in program would lower costs, encourage technological developments, overcome technical

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[5] Federal Motor Vehicle Safety Standard 208 (49 C.F.R. § 571.208).

safety problems, and win consumer acceptance – "all of which would promote [Regulation] 208's safety objectives." *Id.* at 876. In a five to four decision, the Supreme Court held that the plaintiff's suit would stand as an obstacle to the accomplishment of this objective, and therefore, Regulation 208 preempted the state law action.

d. Appellate Courts

Of the three appellate courts that have faced this issue, one court found no preemption, while two courts found Regulation 205 preempted any state law claim.[6]

In *O'Hara v. General Motors*, 508 F.3d 753 (5th Cir. 2007), the plaintiff brought suit alleging General Motors' use of tempered glass in the side window was unreasonably dangerous and contended the use of advanced glazing would have decreased the likelihood of passenger ejection. The Fifth Circuit first found Regulation 205 differed from Regulation 208. The court then reviewed the text and history of

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[6] Several trial courts and districts courts have faced this issue. *See Erickson v. Ford Motor Co.*, 2007 WL 2302121 (D. Mont. 2007); *Martinez v. Ford Motor Co.*, 488 F. Supp.2d 1194 (M.D. Fla. 2007) (finding preemption) and *Raley v. Hyundai Motor Co.*, 2010 WL 199971 (W.D. Okla. 2010); *Spruell v. Ford Motor Co.*, 2008 WL 906648 (W.D. Ark. 2008); *Burns v. Ford Motor Co.*, 2008 WL 222711 (W.D. Ark. 2008); *MCI Sales and Serv., Inc. v. Hinton*, 272 S.W.3d 17 (Tex. App. 2008) (finding no preemption).

Regulation 205 and determined "it is best understood as a minimum safety standard." *Id.* at 762. Thus, the Fifth Circuit held the regulation did not preempt the plaintiff's products liability suit.

Conversely, when faced with the same issue, the West Virginia Supreme Court held Regulation 205 did preempt a claim against a manufacturer in which the plaintiff alleged his vehicle was defective because Ford used tempered glass in the side window. *Morgan v. Ford Motor Co.*, 680 S.E.2d 77 (W. Va. 2009). Although the court recognized the Fifth Circuit's position in *O'Hara*, the court found "[Regulation] 205 permits the manufacturer to make a choice between available safety options for side-window glass; a design defect claim would foreclose choosing one of those options." *Id.* at 94. In reaching this conclusion, the court observed that although this suit concerned only one glass option – tempered glass – other lawsuits could theoretically eliminate all options allowed by Regulation 205 and "eviscerate the unitary federal regulation and leave manufacturers with no options for glazing materials in vehicle side windows." *Id.* The court ultimately found its decision was controlled by *Geier* and held Regulation 205 preempted the suit because the purpose of the regulation was to give manufacturers the option of choosing between laminated and tempered glass in side windows.

In *Lake v. Memphis Landsmen, LLC*, the Court of Appeals of Tennessee agreed with the West Virginia Supreme Court and found Regulation 205 preempted a state law products liability claim. 2010 WL 891867

(Tenn. Ct. App. March 15, 2010). The court determined that in issuing the notice of withdrawal and declining to require advanced glazing, NHTSA intended to adopt a policy that allows the option of tempered glass based on cost and safety considerations. Thus, the court held because "a rule requiring laminated glass in side windows, as proposed by the [plaintiff's state law] claims . . . would serve as 'an obstacle to the accomplishment and execution of' a federal policy" Regulation 205 preempted the suit. *Id.* at 9 (citing *Geier*, 529 U.S. at 881).

III.

Clearly, courts across the country are struggling over Regulation 205 and whether it preempts conflicting state law actions. Nonetheless, in the absence of a determination from the United States Supreme Court on this matter, we must render our best judgment as to whether Regulation 205 provides a manufacturer with options and, therefore, preempts Appellant's suit, or merely provides a safety floor and allows Appellant's suit to go forward.

We agree with the reasoning espoused in *Morgan* and *Lake* and hold Regulation 205 preempts this suit. In our view, the purpose of this regulation is to provide an automobile manufacturer with a range of choices among different types of glazing materials, as opposed to providing a minimum standard. Regulation 205 directs manufacturers that they "shall conform" to ANS Z26, which specifically provides

manufacturers the option of using tempered glass for side windows.[7] In issuing the notice of withdrawal, NHTSA declined to modify Regulation 205 and require advanced glazing. Thus, the notice of withdrawal kept Regulation 205 intact, thereby preserving the manufacturer's option to use tempered glass on side windows.

To allow this suit to go forward would sanction a jury verdict finding the Ford F-150 pickup truck to be defectively designed solely because it selected the federally authorized choice of tempered glass. Because we believe such a result would stand as an obstacle to achieving the purposes and objectives of Regulation 205, this state tort action presents a conflict between federal law and state law. Thus, Regulation 205 preempts this state law claim based on Ford's selection of tempered glass for the side windows of the F-150 pickup truck. *Compare Wyeth*, 129 S.Ct. 1187 (finding no preemption where the regulation provided a safety floor for warning labels for drug manufacturers, and the FDA did not prohibit manufacturers from adding further warnings to the label; therefore, a state law tort claim would not

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[7] We recognize the Foreword to ANS Z26 contains language which supports a finding of no preemption, but the Foreword also provides that it "is not part of" ANS Z26. A careful review of the actual standard, including its technical and testing requirements, sets forth clear standards and choices for manufacturers and, therefore, favors a finding of preemption.

stand as an obstacle to the accomplishment of Congress' purposes).

IV.

We affirm the trial court's order granting Ford's motion for summary judgment.

AFFIRMED.

TOAL, C.J., PLEICONES, BEATTY and HEARN, JJ., concur.

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	Civil Action No. 06-CP-38-1071
Mary Robyn Priester, Individually and as Natural Mother/Next of Kin, and Personal Representative of Estate of James Lloyd Priester, Plaintiff, vs. Preston Williams Cromer, Stage Light Management, d/b/a Showgirls(z); and Lloyd Brown, individually and doing business as Showgirls(z), and Nikki D's, Inc., and Ford Motor Co., Defendants.	**ORDER GRANTING DEFENDANT FORD MOTOR COMPANY'S MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court for supplemental argument of Defendant Ford Motor Company's ("Ford") Motion for Summary Judgment on March 12, 2008. The initial hearing on this motion, with full arguments of counsel and briefing by the parties, was conducted November 8, 2007, in Orangeburg. Present at both hearings were Darrell Thomas Johnson, Jr., on behalf of Plaintiff Mary Robyn Priester ("Plaintiff") and Elbert S. Dorn on behalf of Ford. For the reasons set forth below, the Court

hereby grants Ford's motion in its entirety, and the action against Ford is dismissed in its entirety and with prejudice.

I. FACTUAL BACKGROUND

This product liability action involves the single-vehicle, single-fatality collision of a 1997 Ford F-150 pickup truck that occurred at approximately 3:45 a.m. on August 17, 2002, when Defendant Preston Cromer ("Cromer") was driving the vehicle at an excessive rate of speed in the eastbound lane of Route 160, near St. George, South Carolina. Cromer failed to negotiate an acute right bend in the roadway, exited the paved surface to the left, entered a ravine, and overturned off-road several times. The vehicle came to rest on all four wheels facing east in a brushy area approximately 55 feet from the paved surface of the roadway. Plaintiff's son, 16 year-old James Lloyd Priester ("Plaintiff's Decedent"), a rear seat passenger, was unrestrained and ejected from the vehicle during the accident sequence. Plaintiff's Decedent sustained fatal injuries as the subject vehicle came to rest on top of him. Plaintiff filed her Summons and Complaint in the Court of Common Pleas for Hampton County on September 21, 2004, and the case was transferred to Orangeburg County via Consent Order entered July 1, 2005. In her Amended Complaint, filed March 31, 2005, Plaintiff alleges causes of action against Ford for breach of warranty and strict liability arising from Ford's alleged failure to install window glazing that would not shatter upon impact

and that would prevent occupants from being ejected during rollover accidents. Plaintiff further alleged the absence of such glazing materials rendered the vehicle defective and unreasonably dangerous. Am. Compl. at ¶¶ 22-30. Thus, Plaintiff's sole product liability claim is based upon her argument that the side window material Ford selected and installed in the subject vehicle rendered it defective and unreasonably dangerous. Ford filed a timely answer denying the allegations of the Amended Complaint and raising numerous substantive defenses, including that Plaintiff s claims are barred by the doctrine of preemption. Am. Answer to Am. Compl. at ¶ 50.

Federal Motor Vehicle Safety Standard 205 ("FMVSS 205") specifies the materials requirements for "*Multipurpose passenger vehicles*" in Section S5.1.1.6: "Multipurpose Passenger vehicles. Except as otherwise specifically provided by this standard, glazing for use in multipurpose passenger vehicles shall conform to the requirements for glazing for use in trucks specified in ANSI Z26." ANSI Z26.1-1977, incorporated by reference into FMVSS 205, consists of a listing of permissible materials for automotive window glazing, including tempered glass, and a set of testing protocols that may or may not apply to any given window location depending on the location of the window and the type of vehicle. ANSI Z26.1-1977 specifically reiterates the determination that all the approved glazing materials are acceptable under the standard.

There is no dispute Plaintiff's claims with respect to the type of glazing material Ford used in the side windows of the subject F-150 pickup truck are based exclusively on Ford's choice of tempered glass versus alterative glazing materials. Plaintiff pleads no other claim relating to the glass/glazing in this vehicle's side windows. Instead, she proceeds solely on the theory that the subject Ford F-150 should have been designed with side windows made from laminated glazing materials instead of the tempered glass Ford chose from among options provided in FMVSS 205. Plaintiff's claim is based exclusively on the theory that Ford should have equipped the subject vehicle with windows made of something other than the tempered glass actually installed and would effectively nullify a design option specifically preserved by FMVSS 205.

Ford filed its Motion for Summary Judgment on July 31, 2007, followed by its Memorandum in Support on October 1, 2007, in which Ford cited extensive authority holding that FMVSS 205 preempts state law design defect claims regarding a manufacturer's decision to use the tempered-glass option granted by federal law. Following oral argument of Ford's Motion on November 8, 2007, a panel of the Fifth Circuit Court of Appeals addressed this preemption issue and held that FMVSS 205 did not preempt plaintiffs' state law defect claims. *See O'Hara v. General Motors Corp.*, Case No. 06-10498, Slip Opinion, Nov. 20, 2007. The *O'Hara* panel's decision is the lone federal appellate decision addressing the preemptive reach

of FMVSS 205. Having considered the submissions and oral argument of the parties, as well as supplemental briefing and argument addressing the *O'Hara* decision, this Court agrees that Plaintiff's glass design-defect claims are preempted by FMVSS 205, a determination that is consistent with precedent from the South Carolina Court of Appeals and the Fourth Circuit Court of Appeals discussed herein below. The Court is also persuaded that the *O'Hara* decision, which is not binding authority, reached the wrong conclusion regarding the preemption question. For these reasons, Ford's motion is granted in its entirety.

II. CONCLUSIONS OF LAW

Plaintiff's glazing design defect claim is impliedly preempted by FMVSS 205 (49 C.F.R. § 571.205 (1997 version)), a federal regulatory provision affording automotive manufacturers the option to install side windows made from either tempered glass or laminated glazing. Ford complied with FMVSS 205 when it installed tempered glass side windows in the subject 1997 Ford F-150 pickup truck and is, as such, entitled to summary judgment on Plaintiff's claim that its selection of tempered glass rendered the vehicle defective and unreasonably dangerous.

A. Plaintiffs Glazing Defect Claims Are Preempted.

Ford cannot be held liable for choosing tempered glass without contravening the federal regulatory

scheme applicable to automobile design and safety under FMVSS 205, the Safety Act of 1966, and the Supremacy Clause of the United States Constitution. The Safety Act, under which the FMVSS are promulgated, contains a preemption clause that provides a state may establish "a [safety] standard applicable to the same aspect of performance . . . only if the standard is identical to the [Federal safety] standard." 49 U.S.C. § 30103(b). The Act also contains a savings clause, which provides that "compliance with a [Federal] motor vehicle safety standard . . . does not exempt a person from liability at common law." 49 U.S.C. § 30103(e). The tension between these provisions initially led to conflict among the circuit courts of appeal regarding preemption of state law claims seeking to impose tort liability on automobile manufacturers who exercise design options specifically preserved pursuant to the FMVSS.

The Supreme Court resolved the conflict in *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000). The *Geier* Court identified irreconcilable conflict between FMVSS 208 (supplemental restraint systems) and the petitioner's claim that Honda, which selected one of FMVSS 208's no-airbag passive restraint options, should nonetheless have equipped its automobile with airbags. The Court concluded that because FMVSS 208 intentionally provided automotive manufacturers with options, a state court action to compel manufacturers to choose one available option over another would, in fact, frustrate the federal regulatory scheme. Thus, the Court reasoned

the state law claim was preempted by the federal regulation. *See Geier*, 527 U.S. at 901. Numerous courts applying *Geier* likewise have concluded that defect allegations premised on the use of tempered glass, versus alternative glazing material such as laminated glass, are preempted by federal law and rejected the exact claim Plaintiff makes in this case.[1]

The key factors the Court considers determinative of the preemption question are whether FMVSS 205 permits manufacturers to choose among available options and whether the design defect claim would foreclose that option. When a federal motor vehicle safety standard provides manufacturers with options to achieve the standard's objective, state court design defect claims based on the failure to adopt available alternatives are impliedly preempted. *See, e.g., Griffith*, 303 F.3d at 1280-1281 ("Because plaintiff

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[1] *See, e.g., David Erickson v. Ford Motor Company*, Case No. CV-04-88-BU-RFC-CSB (D. Mont. June 18, 2007); *Martinez v. Ford Motor Company*, Case No. 8:06-cv-798-T-26MAP (M.D. Fla. April 26, 2007 Order at 4-5); *Brown v. Land Rover North America, Inc.*, C.A. No. 01-1923-G, Superior Court, Commonwealth of Massachusetts (Mass. August 2, 2006); *William F. Collins v. State of California*, Case No. CV007121, Superior Court, State of California (Order dated January 29, 2007); *Evenson v. General Motors Corp., AP Technoglass Co., and Sakina Hussain*, Cause No. 03-L-2854, Circuit Court of Cook County, Illinois (Orders dated December 23, 2003, November 17, 2004, and December 14, 2005); *Kim v. Continental Tire North America, Inc., at* [sic] *al.*, CV 2006-050517, Superior Court of Arizona, Maricopa County (Order dated August 21, 2007); *Rotter v. Ford Motor Co., et al.*, Index No: 11183/03 (Order dated May 29, 2007).

sued defendants for exercising an option explicitly permitted by Congress, a conflict exists between state and federal law"); *James v. Mazda Motor Corp.*, 222 F.3d 1323, 1326 (11th Cir. 2000). Thus, where FMVSS 205 expressly provides manufacturers with options to achieve the regulation's stated goal, a design defect claim based on the decision to forego one option, i.e., laminated glass, is preempted as a matter of law. *Griffith,* 303 F.3d at 1280-81 ("when a FEDERAL MOTOR VEHICLE SAFETY STANDARD leaves a manufacturer with a choice . . . , a state suit that depends on foreclosing one or more of those options is preempted"); *Dallas,* 725 F. Supp. at 906 (same); *Brewer,* 926 S.W.2d at 780 (same).

Numerous courts have held common law glazing defect allegations conflict with and are impliedly preempted by, the regulatory considerations underlying both FMVSS 205 and 208. This case demands the same result. Plaintiffs claim that the subject vehicle was defectively designed because it incorporated tempered glass – an option expressly preserved by FMVSS 205 – is preempted. As in *Geier,* the decision to provide design options to automobile manufacturers was made with specific policy objectives in mind. Indeed, the safety and regulatory policy concerns motivating NHTSA to retain the tempered glass option under FMVSS 205 are no less clear and compelling than the justifications for NHTSA's passive restraint options under FMVSS 208 recognize [sic] in *Geier.* Because Plaintiff's suit would undermine that

policy objective, Ford is entitled to an Order granting summary judgment in its favor on these claims.

B. South Carolina Code Section 56-5-5010, Safety Glass in Motor Vehicles, Is Inapplicable And Is Likewise Preempted.

Plaintiff relies, in part, on *S.C. Code Ann.* § 56-5-5010, to oppose Ford's motion on the grounds that this statute empowers the State to restrict the design and manufacture of vehicles not equipped with "safety glass,"[2] including the subject 1997 Ford F-150 pickup truck. Plaintiff's Memorandum in Opposition at 9-10. According to Plaintiff's argument, any vehicle equipped with tempered glass in side windows would be in violation of state law. The Court is not persuaded that the statute bars the use of tempered glass in side vehicle windows as urged by Plaintiff. In fact, this position runs contrary to the very definition of "safety glass" incorporated into FMVSS 205. Specifically, ANSI Standards Z26.1a (1980) and Z.26.1 (1996) provide that "safety glass means safety glazing materials predominantly ceramic in character . . . including laminated glass **and tempered glass**."

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[2] Section 56-5-330 defines "safety glass" as "any product composed of glass, so manufactured, fabricated or treated as substantially to prevent shattering and flying of the glass when struck or broken or such other or similar product as may be approved by the Department of Public Safety." The Court notes with passing interest that Section 56-5-5010, enacted in 1949, has never been cited or discussed in any published South Carolina appellate decision.

(Emphasis added) In any event, for the same reasons outlined in the preceding section, any attempted application of *S.C. Code Ann.* 56-5-5010 to restrict the use of glazing materials expressly approved by Congress would be preempted. It does not matter whether the invasion of federal regulation comes through statute or the prosecution of a common law tort claim – either is preempted for the reasons stated herein. As such, Plaintiff's reliance on the statute is unavailing, and Ford is entitled to summary judgment.

C. The *O'Hara* Decision

Subsequent to the first oral argument of Ford's Motion on November 8, 2007, a panel of the Fifth Circuit Court of Appeals addressed the precise preemption question at issue here and held that FMVSS did not preempt plaintiffs' state law defect claims. *See O'Hara v. General Motors Corp.,* Case No. 06-10498, Slip Opinion, Nov. 20, 2007. Thereafter, this Court directed the parties to submit additional briefing to address the impact of the fifth circuit panel's decision and also heard additional oral argument from the parties. Having considered the additional briefing and argument on this issue, this Court is persuaded that the *O'Hara* panel relied on the wrong data, did not consider important policy pronouncements of the National Highway Traffic Safety Administration ("NHTSA"), and, as a result, reached the wrong conclusion regarding preemption. For these reasons, this Court is further persuaded that

the *O'Hara* decision does not stand as an impediment to the granting of Ford's motion.

The panel decision in *O'Hara* is not binding on this Court and stands in stark contrast to controlling authority within the fifth circuit [sic]. Neither the United States Supreme Court, the South Carolina Supreme Court, nor the Fourth Circuit Court of Appeals has addressed the preemptive effect of FMVSS 205. Even so, the Supreme Court, the South Carolina Court of Appeals, and the Fourth Circuit have provided significant guidance through related rulings. These rulings indicate that these courts would ultimately hold that FMVSS 205 preempts state common law glass design-defect claims.

Although the *O'Hara* panel stated that FMVSS 205 appeared to be a minimum standard, it did not cite any NHTSA statements or pronouncements specifying that FMVSS 205 was meant to be a minimum performance standard (and it did not point to any language of the text showing FMVSS 205 to be a minimum requirement). The text of FMVSS 205 does not specify that vehicle manufactures [sic] must use "at least" tempered glass, and there is no implication that other types of glass are better or safer than tempered glass. NHTSA did not consider one type of glass superior to other allowable types under all circumstances. To the contrary, the American National Standards Institute specifically addressed the relative "Degree of Safety" between the respective types of glass. *See* American National Standard for Safety Glazing Materials for Glazing Motor Vehicles and

Motor Vehicle Equipment Operating on Land Highways – Safety Code ANSI/SAE Z26.1-1977, as supplemented by ANSI Z26.1a-1980, which has been incorporated into FMVSS 205:

> One safety glazing material may be superior for protection against one type of hazard, whereas another may be superior against another type. Since accident conditions are not standardized, no one type of safety glazing material can be shown to possess the maximum degree of safety under all conditions against all conceivable hazards.
>
> ANSI Z26.1 at S2.2.

Consequently, NHTSA recognized that some of the glazing options afforded manufacturers would be better if one type of accident occurs and another type of glazing would be better in another type of incident. As noted below, NHTSA also made pronouncements that it believed belted occupants *would be safer* if manufacturers used tempered glass in side windows rather than any of the other available types of glass. With this in mind, it is inconsistent with the Standard's text to hold that NHTSA meant FMVSS 205 to be a "minimum" standard with regard to tempered glass (or any of the available alternatives).

The fifth circuit [sic] panel in *O'Hara* recognized the precise statement of the law applicable here, but did not apply it:

> When a federal safety standard deliberately leaves manufacturers with a choice among

> designated design options in order to further a federal policy, a common law rule which would force manufacturers to adopt a particular design option is preempted.
>
> *O'Hara,* Slip Opinion at 8-9.

This is precisely what NHTSA did pursuant to FMVSS 205; i.e., NHTSA deliberately left manufacturers with a choice. The *O'Hara* panel failed to consider important pronouncements made by NHTSA. Consequently, the panel did not properly apply NHTSA's statements to the parameters in *Geier* regarding preemption. For instance, NHTSA specifically found that tempered glass in side-windows exposed belted occupants to a lower potential for injury than did alternative glazings, and it pronounced that the agency was "extremely reluctant to pursue a requirement that may increase injury risk for belted occupants to provide enhanced safety benefits primarily for unbelted occupants. . . ." NHTSA, Ejection Mitigation Using Advanced Glazing: Final Report, 2001 at x. Accordingly, it appears NHTSA determined this trade-off to be the wrong course of action.

The *O'Hara* panel also opined that tempered glass in side-windows must be a minimum standard because laminated glass was required for use in front windshields. *O'Hara* at 14 (speculating that laminated glass could not be considered unsafe because NHTSA "continued to require advanced glazing in vehicle windshields.") The panel simply did not

recognize that side-windows and windshields are different and that NHTSA was consciously aware of these differences. NHTSA has (since 1967) required vehicle manufacturers to use laminated glass in the front windshields of vehicles. *See* Initial Federal Motor Vehicle Safety Standards, 32 Fed. Reg. 2408, 2414 (Feb. 3, 1967).

Despite extensive research on the topic, NHTSA has never required laminated glass to be used in side windows, but this does not imply that NHTSA is simply letting manufacturers "get away" with an inferior option. The injury consequences related to: (1) impacts into front windshields; and, (2) impacts into side windows, have specifically been considered by NHTSA as a part of its regulatory policy regarding FMVSS 205:

> The HIC-1000 criterion was established for use with a full dummy to evaluate the threat of serious head injury from an impact to the front of the head [coming into contact with a laminated glass windshield]. For this reason, the HIC-1000 should not be directly applied to the FMH HIC [used for side impacts]. First, head impacts to side glazings generally occur to the side of the head. It is well accepted that the side of the human head has a lower injury threshold than the front of the head. That is, a blow to the side of a head will generally produce a more severe injury than would that same blow to the front of the head.
>
> 1995 Report at 5-2.

At any point, NHTSA could have required side glazings to be made of laminated glass, as they did with windshields in 1967. However NHTSA, in official reports, expressly recognized that side impacts were different and that the side of a human head has a lower injury threshold than the front of the head. This was part of the consideration leading to NHTSA's specific decision to keep tempered glass as an approved option for side windows: "the potential for head and perhaps neck injury increases with increased glazing stiffness. [ ] Therefore, the strength of current windshields would appear to be a reasonable upper bound for side glazing strength." 1995 Report at 7-19.

The *O'Hara* panel apparently misunderstood advanced glazing and the rule announced in *Geier*. For example, the *O'Hara* panel found that FMVSS 205 could not be preemptive because NHTSA "'does not convey an authoritative message of federal policy *against*' advanced glazing." *O'Hara*, Slip Opinion, pg. 14 (emphasis added) (internal citation omitted). While it is true that NHTSA did not take a position against advanced glazing with FMVSS 205, the agency also did not take a position against airbags with FMVSS 208, which was reviewed in *Geier*. This Court is convinced that the *O'Hara* panel got it wrong; it's not about NHTSA being against advanced glazings (or airbags); rather, it is about the preservation of Congressionally mandated automotive design options as expressed via enactment of the Federal Motor Vehicle Safety Standards.

The *O'Hara* decision also stands in stark contrast to additional authority from within the fifth circuit [sic]. For example, in *Carden v. General Motors Corp.*, Case No. 06-11182, Slip Opinion, Dec. 4, 2007, decided shortly after the *O'Hara* opinion was released, a separate panel considered the preemptive effect of FMVSS 208 on plaintiff's claim that the rear middle seating position in his 1999 Pontiac Grand Am should have been equipped with a three-point restraint instead of the permitted two-point lap-only belt. The *Carden* panel's finding of preemption was justified, in part, by the court's conclusion that NHTSA's decision to provide manufacturer's [sic] with a choice was "deliberate, and [because] the agency identified specific policy reasons for its decision." *Id.* at 5. The panel also rejected plaintiffs' reliance on *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), addressed in more detail *supra.* because "*Sprietsma* involved a complete absence of regulatory action, which was not the case here. . . . Thus, *Sprietsma* does not control." *Id.* at 6. In the final analysis, the *Carden* Court determined that "[b]ecause [plaintiffs'] claim would foreclose a deliberate option left to manufacturers . . . [plaintiffs'] claims are preempted." *Id.* at 7. The reasoning and conclusion reached by the *Carden* panel more fully comport with the greater weight of authority on this issue and support Ford's position that state law claims that would eliminate options deliberately preserved under FMVSS 205 are preempted. As such, and in light of the plethora of authority reaching the opposite conclusion, this Court rejects *O'Hara* as unpersuasive and inapplicable.

In *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), the Supreme Court analyzed the Coast Guard's "decision not to regulate propeller guards." *Id.*, 537 U.S. 51 at 64-66. Unlike FMVSS 205, which approves the use of tempered glass, there was simply no regulation at issue in *Sprietsma*. *Id.*, 537 U.S. at 65. The reasoning in *Sprietsma* is not applicable to FMVSS 205. A decision not to regulate is significantly different than a decision to approve, or continue to approve, the use of a set of alternatives. The regulation in *Sprietsma* was promulgated under a completely different statutory regime; the Federal Boat Safety Act. Preemption was not found in *Sprietsma* because no regulations regarding propeller guards had ever existed and, more importantly, the Coast Guard had expressed a policy decision that state laws not subject to a specific regulation would not be preempted. *Id.* Absence of federal regulation, therefore, could not stem from a federal policy that state regulation should not exist regarding propeller guards. *Id.*, 537 U.S. at 67.

Pursuant to FMVSS 205, NHTSA has a positive enactment granting manufacturers the option to use tempered glass in side windows of passenger vehicles. NHTSA considered doing what Plaintiff wants to do in this case; foreclose the option to use tempered glass. NHTSA, for policy reasons, deliberately chose not to foreclose that option. The State is not allowed to foreclose the option because NHTSA did not want it foreclosed: "there is no reason to have advanced glazing regulatory requirements." Final Report at x.

Unlike the Coast Guard, NHTSA was not constrained by any stringent rules related to justification. Since it declared that there is "no reason" for tempered glass not to be an option, the State is preempted from instituting requirements that would prevent it from being an option.

Although the South Carolina Supreme Court has not addressed FMVSS 205, the South Carolina Court of Appeals has analyzed the preemptive effect of federal law on state law tort claims that seek to restrict automotive design options expressly preserved by Congress. *See Jamison v. Ford Motor Company,* 373 S.C. 248, 263, 644 S.E.2d 755, 763 (Ct. App. 2007), *reh'g denied* (May 17, 2007) (quoting *Geier,* 529 U.S. at 862 ("FMVSS 208 was viewed: 'not as a minimum standard, but as a way to provide a manufacturer with a range of choices . . . '")). Thus, plaintiff's argument that Ford should be held liable for making a choice that was specifically preserved and approved by Congress in FMVSS 208 was preempted. *Id.*, 644 S.E.2d at 764. The same logic must control in this situation where Congress has specifically approved, via enactment of FMVSS 205, a range of glazing options available to automotive manufacturers.

The Fourth Circuit Court of Appeals has likewise determined that state common law claims that seek to restrict automotive design options, even where the claim would "only partially frustrate the goal [of preserving specific design options]," are preempted by federal law. *Moser v. Ford Motor Company,* 28

Fed. Appx. 168, 171, 2001 WL 1387600, *3 (4th Cir. 2001) (unpublished). In that case, plaintiff attacked Ford's selection of a two-point passive restraint system as defective because it did not also include a manual lap belt. *Id.* Because plaintiff's claim would "eliminate[ ] one of the possible types of passive restraint systems," the court was required to assess the preemptive effect of FMVSS 208. *Id.* Answering in the affirmative, the court observed:

> We need not decide whether allowing a single state tort lawsuit to exclude one type of passive system so frustrates the goals of FMVSS 208 as to require preemption, because the potential cumulative effect of such suits could completely frustrate the goals of FMVSS. While Moser's suit seeks only to exclude one type of passive restraint system, the two-point passive system, similar state tort actions could likewise seek to exclude another specific type of passive system, then another, then another. While no one claim would result in a complete frustration of the goal of permitting a mix of passive systems, the net effect of state tort law could be to exclude most or all of the passive systems that were available to manufacturers. . . .
>
> *Id.*

In this case Plaintiff does not assert that Ford should have provided more than the federal standard allows; rather, plaintiff is attempting to foreclose a Congressionally-mandated option specifically granted to manufacturers by the federal standard. NHTSA

determined that tempered glass should be preserved as a mandated option after lengthy study and review. Thus, Plaintiff's attempt to foreclose Ford's use of the tempered glass option by characterizing it as "defective" under state tort law concepts amounts to nothing more than an attempt to reduce "the available variety" of glazing options specifically authorized by Congress in FMVSS 205. *Moser*, 28 Fed. Appx. at 171. As such, the reasoning applied by the South Carolina Court of Appeals and the Fourth Circuit Court of Appeals, as well as the majority of courts that have considered this question, must apply. Where Congress has expressly preserved a particular design option, i.e., the use of tempered glazing in automobile side windows, any state law claims seeking to foreclose the option must be viewed as preempted by federal law.

III. CONCLUSION

NHTSA concluded from the available evidence that removal of the tempered glass option could "increase injury risk for belted occupants" and was, therefore, a poor trade for providing a potential benefit "for unbelted occupants." Final Report at x. As such, NHTSA preserved the tempered glass option because it might benefit individuals who use the safety equipment NHTSA requires; i.e., occupants who choose to use their seat belts. *Id.* Since the decision to allow manufacturers to use tempered glass was made with policy reasons in mind, it is an authoritative message of federal policy and is

preemptive of state law to the contrary. Because the regulatory purpose of Federal Motor Vehicle Safety Standard 205 would be advanced by preserving the tempered glass option, and for the other foregoing reasons, Defendant Ford Motor Company's motion for summary judgment is granted in its entirety, and Plaintiff's claims against it are dismissed with prejudice.

AND IT IS SO ORDERED.

/s/ James C. Williams
THE HONORABLE
JAMES C. WILLIAMS
CIRCUIT JUDGE

Orangeburg, South Carolina
April, 2008

FORM 4

STATE OF SOUTH CAROLINA COUNTY OF IN THE COURT OF COMMON PLEAS	**JUDGMENT IN CIVIL CASE** CASE NO. **2006-**CP-38-1071_
Mary Priester, individually and as PR for Estate of James Lloyd Priester	Preston Williams Cromer, Stage Light Management d/b/a Showgirls(z), and Nikki D's Inc., and Ford Motor Company
PLAINTIFF(S)	DEFENDANT(S)

CHECK ONE:

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED**. *(CHECK REASON)*: ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** *(CHECK REASON)*: ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*:
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☐ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Dated at Orangeburg, South Carolina, this 23rd day of July, 2008.

[After reviewing the additional submission by Plaintiff and Defendant Ford Motor and hearing argument of counsel, the Plaintiff's motion for reconsideration is DENIED.]

/s/ James C. Williams
PRESIDING JUDGE

This judgment was entered on the **23rd** day of July 2008, and a copy mailed first class this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

Darrell Thomas Johnson
PO Box 1125
HArdeeville, SC 29927

ATTORNEY(S) FOR THE PLAINTIFF(S)

Elbert Dorn
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Columbia, SC 29202

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

SCCA SCRCP Form 4 Revised 06/2008

The Supreme Court of South Carolina

Mary Robyn Priester, Individually and as Natural Mother/Next of Kin, and Personal Representative of Estate of James Lloyd Priester, Appellant,

v.

Preston Williams Cromer, Stage Light Management, d/b/a Showgirls(z); and Lloyd Brown, individually and doing business as Showgirls(z), Nikki D's Inc., and Ford Motor Company, Inc., Defendants,

Of whom Ford Motor Company, Inc. is Respondent.

The Honorable James C. Williams, Jr.
Orangeburg County
Trial Court Case No. 2006-CP-38-01071

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules, this appeal is hereby certified for review by the South Carolina Supreme Court.

[Mary Robyn Priester
405 Merrick Dr.
Round O., SC 29474]
12-9-09
/s/ MRP

IT IS SO ORDERED.

/s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

December 8, 2009

cc: Darrell Johnson, Jr., Esquire
James Richardson, Jr., Esquire
Curtis L. Ott, Esquire
Carmelo B. Sammataro, Esquire
Robert W. Powell, Esquire
William Wood, Jr., Esquire
The Honorable Jeanette Barber

[SEAL]

The Supreme Court of South Carolina

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CLERK OF COURT

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September 2, 2010

Darrell T. Johnson, Jr., Esquire
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P.O. Box 1125
Hardeeville, SC 29927

James B. Richardson, Jr., Esquire
1229 Lincoln St.
Columbia, SC 29201

Re: Mary Priester v. Preston Cromer (Ford Motor Co.)

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

Justice Kaye G. Hearn,
not participating

September 2, 2010."

The remittitur is today being forwarded to the lower court.

Very truly yours,

/s/ Daniel E. Shearouse
CLERK

DES/dmh

cc: Curtis L. Ott, Esquire
Carmelo B. Sammataro, Esquire
Robert W. Powell, Esquire
William C. Wood, Jr., Esquire